Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

THE PEOPLE OF THE STATE OF MICHIGAN,
PETITIONER

vs.

FAROD MALLORY AND GARY GOODWIN
RESPONDENTS

ON CERTIORARI TO THE COURT OF APPEALS
OF THE STATE OF MICHIGAN

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

UNDER UNITED STATES V LOVASCO, 431 US 783, 97 S Ct 2044, 52 L Ed 2d 752 (1977) AND ARIZONA V YOUNGBLOOD, 488 US __, 109 SCt 333, 102 L Ed 2d 281 (1988), DOES A DUE PROCESS "DELAY IN ARREST" CLAIM REQUIRE BOTH A SHOWING BY THE ACCUSED OF PREJUDICE, AND A SHOWING THAT THE DELAY WAS INTENTIONAL ON THE PART OF THE STATE FOR THE PURPOSE OF GAINING A TACTICAL ADVANTAGE?

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vs.

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RESPONDENTS,

Petition for Certiorari

NOW COME the People of the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, Timothy A. Baughman, Chief of Research, Training and Appeals, and Janice M. Joyce Bartee, assistant prosecuting attorney, and pray that a writ of certiorari issue to review the judgment of the Court of Appeals of the State of Michigan, issued December 22, 1994, leave denied by the Michigan Supreme on April 18, 1995, with three justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported, and is appended as Appendix A. The order of the Michigan Supreme Court is unreported at this time and is appended as Appendix B. The opinion of the trial court is unreported and is appended as Appendix C.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on December 22, 1994. The Michigan Supreme Court denied discretionary appeal, with three justices dissenting from the denial, on April 18, 1995. The jurisdiction of this Court is invoked under 28 USC (1257(3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides, in pertinent part:

"...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATEMENT OF THE CASE

Respondents were charged on May 5, 1989 in a two count information for the June 22, 1984 murder of Donald Bankston, and bound over for trial. An evidentiary hearing was then held on Respondents' due process "delay in arrest" claim. The following testimony was taken.

Respondent Mallory testified that within hours of the killing he was aware of it because he was told of it by one Roy Bell (R, 8). Bell said that Bankston had been killed the night before (R, 9). Bell himself was dead (R, 10). He believed Bell had died in the fall of 1989. Defendant testified that an individual who was with him at this time, and at the time of the murder also so as to be able to supply an alibi, a "Mr. Rushton," was also now dead, having died in the spring of 19898 (R, 14).

Mallory also detailed the periods of time he had been in custody between the offense and the hearing, including 18 months prior to pleading guilty to a federal indictment in a case known as the "Young Boys II" case (R, 15-19).

Codefendant respondent Goodwin also testified. He was in jail for criminal sexual conduct in the first degree, and had been since September 9, 1986 after conviction, and from about April prior to trial (R, 52-53). His aunt could provide an alibi for the murder, he testified, but she had died near the end of 1988 (R, 55-56). He had seen motions filed in another case regarding prearrest delay and the death of alibi witnesses (R, 65-79).

Defendant Goodwin's mother testified regarding the death of her sister, the defendant's aunt (R, 81).

Sgt. Rice testified that during 1986 and 1987 he joined a joint federal-state task force investigating the activity of Young Boys Incorporated, a narcotics distribution gang in Detroit, It was his purpose to investigate a number of homicides believed to be committed by the gang, and federal indictments of over 50 persons were obtained late in the summer of 1987 (R, 1-19-91, 7-10). During his investigation Sgt. Rice learned that one Spencer Holloway had been convicted of first degree murder in Oakland County and was awaiting sentencing. Sgt. Rice interviewed him on or about August 22, 1986 (R, 1-19-91, 17-20). Sgt. Rice was working under the direction of Assistant United States Attorney Jeffrey Foran, as a deputy United States Marshall, and was directed and took an oath to keep secret the proceedings before the grand jury (R, 1-19-91, 12). Sgt. Rice could disclose no

such information until the indictments in 1987.

Spencer Holloway implicated both Respondents in the Donald Bankston killing, along with others (R, 1-19-91, 19-23). Because Sgt. Rice was simultaneously examining over twenty other related homicides committed over the period of several years, and as a result of federal proceedings, securing individuals for questioning often involved use of the federal detainer act for witnesses, with attendant procedural delays.

By February of 1988, Sgt. Rice was able to corroborate some of Holloway's information through an interview with one Charles Obey. Milton Jones was interviewed in late summer of 1988, after his custody had been obtained by use of the federal act, and Portia Jones, another individual named by Holloway, was interviewed later. During this entire period Sgt. Rice did not

know and had no way of knowing that if charged Respondents would claim alibi. A warrant was issued in May of 1989 charging the Respondents.

After argument was heard, the trial court rendered a written opinion. The court held that the Respondents had shown "some" prejudice through the death of the alleged witnesses, though also recognizing that very similar claims had been brought by other members of Young Boys, Inc (Op, 6). The court found that a warrant request was initially made in 1985, but denied because of insufficient evidence. A year later, said the court, the statement of Spencer Holloway provided sufficient evidence to charge, but the delay which followed was the result of the desire of Sgt. Rice to corroborate the statement (Holloway was a convicted murderer), and an agreement with federal authorities not to disclose evidence obtained as part of the

grand jury investigation of Young Boys. This agreement was in part made so as not to endanger witnesses. The trial court found this delay justifiable, or in the words of the court, "explainable." (Op, 6-7).

The court also found that the delay to obtain corroboration was a "reasonable cause for delay," (Op, 7), but noted that after the statement of Charles Obey which provided corroboration in February of 1988 no warrant was sought until October of 1988. The court found this delay "explainable" as the investigation was not complete (Op, 7). Nonetheless the court concluded that though the delays were "explainable" and "reasonable' they nonetheless, in cumulation, were "unreasonable" violating due process (Op, 7-8). The court also noted that the warrant requested submitted in October of 1988 was not signed by the prosecutor for 7

months because a new prosecutor was on the case who wanted to talk to the witnesses (R, 7-8). The court found this delay "unexplainable." The court continued on to find that the due process meaning of a "deliberate delay" as a factor was "deliberate delay to prejudice the defendant." The court found that the delays "were not deliberate in that the delays were not designed to prejudice the Respondents. Nor does the delay by the prosecution which was not fully explained appear to be in bad faith." (Op, 8). However, the court found nonetheless that "these delays were deliberate <u>in the sense that they were intentional</u>." (Op, 8, emphasis added). For this reason, the court granted the motions to dismiss the murder charges.

On appeal, the Court of Appeals held simply that "The prosecution's reasons for

delaying the issuance of warrants until nearly two years after the federal grand jury disbanded did not outweigh the prejudice suffered by Respondents .... Plaintiff's claim that a defendant must show bad faith pursuant to Arizona v Youngblood ...is unsupported by the cited case of People v Leigh...." Opinion of December 22, 1994. Petitioner's application for leave to the Michigan Supreme Court was denied by that court on April 18, 1995, with three justices dissenting from the denial of leave.

REASONS THE WRIT SHOULD BE GRANTED

Since this court's decision in United States v Lovasco, 431 US 783 (1977) lower federal courts, state courts, and litigants, have struggled to ascertain the requirements for a due process delay in charging claim, with conflicting results. A number of jurisdictions hold that improper motive--deliberate delay in order to gain a tactical advantage--is a requirement for the success of a due process claim. See e.g. United States v Lebron-Gonzalez, 816 F2d 823 (CA 1, 1987); Hoo v United States, 825 F2d 667 (CA 2, 1987); United States v Ismaili, 828 F2d 153 (CA 3, 1987); United States v Jenkins, 701 F2d 850 (CA 10, 1983); United States v Caporale, 806 F2d 1487 (CA 11, 1986); United States v Lash, 937 F2d 1077 (CA 6, 1991)("Here defendant has made no attempt to establish that the delay resulted from

an intentional effort by the government to gain an advantage.").

Other cases, however, speak of the due process test as a balancing of prejudice against the explanation for the delay. See e.g. United States v Valentine, 783 F2d 1413 (CA 9, 1986); United States v Automated Medical Laboratories, 770 F2d 339 (CA 4, 1985). Some internal conflicts appear to exist, see Dickerson v Louisiana, 816 F2d 220 (CA 5, 1987); United States v Hollins, 811 F2d 384 (CA 7, 1984). See also the opinion of Justice White dissenting from the denial of certiorari in Hoo v United States, 98 L Ed 2d 777 (1988).

Moreover, state courts are not consistent on the question, and consequently are on one side or the other of the question of whether bad faith on the part of the Government is a necessary component of a due process claim, as petitioner submits Lovasco teaches. See,

for example, the opinion of the Supreme Court of Illinois in People v Lawson, 367 NE2d 1233 (1977) rejecting a claim that Lovasco requires intentional delay to disadvantage the accused as a part of the due process violation, in comparison with State v Grissom, 746 P2d 661 (NM App, 1987), citing United States v Jenkins, supra, with approval.

Petitioner would further submit that Arizona v Youngblood, 488 US 51, 102 L Ed 2d 281, 109 S Ct 333 (1988), holding that a necessary part of the claim when a due process claim is raised due to loss of evidence is that the government have acted in bad faith is instructive on the point, for the "prejudice" component of a due process delay in arrest claim is simply a claim of loss of evidence through government "inaction," and should thus require a showing of bad faith just as does a loss of evidence claim.

Michigan, like most jurisdictions, has a statute of limitations for criminal actions, which, like most jurisdictions, exempts the crime of murder from any time limit. Statutes of limitations express the legislative will as to when charges should be viewed as stale, with the due process clause to play only a limited role to guard against government bad faith action which causes actual prejudice. Because the course of the law has not run smooth on this question since Lovasco, leading to a result such as that in the instant case, where a murder case can be dismissed despite a finding that virtually all of the delay was explainable, on the ground that due process was nonetheless violated despite a lack of bad faith because the delay was "intentional" in the sense of "on purpose," though not for the purpose of disadvantaging the accused.

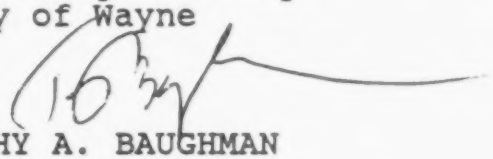
This Court should grant plenary revi
on this important question of nation
jurisprudential significance.

CONCLUSION

WHEREFORE, Petitioner respectfully submits that plenary review is warranted, and requests that certiorari be granted.

Respectfully submitted,

JOHN D. O'HAIR
Prosecuting Attorney
County of Wayne



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Dated: May 8, 1995
TAB/JMJB/jh

APPENDIX A: COURT OF APPEALS OPINION

PEOPLE V FAROD MALLORY AND GARY GOODWIN

DOCKET NO. 136641. UNPUBLISHED

DECEMBER 22, 1994

Before: Gribbs, P.J., and White and John F. Foley, JJ.

MEMORANDUM

Plaintiff appeals as of right from the lower court order dismissing charges of first-degree murder, MCL 750.316; MSA 28.548, and felony-firearm, MCL 750.227b; MSA 28.424(2), against defendants due to pre-arrest delay. We affirm.

The lower court explained its reasoning in a lengthy opinion in which it carefully discussed each period of delay. The trial court considered and weighed the

reasons for delay and the prejudice to defendants. We conclude that the trial court did not err in dismissing the charges. The prosecution's reasons for delaying the issuance of warrants until nearly two years after the federal grand jury disbanded did not outweigh the prejudice suffered by defendants. People v Reddish, 181 Mich App 625, 450 NW2d 16 (1989); People v Bisard, 114 Mich App 784; 319 NW2d 670 (1982). Plaintiff's claim that a defendant must show bad faith pursuant to Arizona v Youndblood, 488 US ; 109 S Ct 333; 102 L Ed 2d 281 (1988) is unsupported by the cited case of People v Leigh, 182 Mich App 96,. 98; 451 LNW2d 512 (1989).

Affirmed

Roman S. Gribbs
Helene N. White
John F. Foley

APPENDIX B:
ORDER OF MICHIGAN SUPREME COURT

ORDER
Entered: April 18, 1995

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellant,

v SC: 102051
COA: 136641
FAROD MALLORY AND LC: 89-009426
GARY GOODWIN
Defendants-Appellees.

On order of the Court the application for leave to appeal is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.

Brickley, C.J., and Boyle and Riley, JJ, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of the order entered at the direction of the Court.

April 18, 1995 /s/Corbin R. Davis
Clerk

APPENDIX C:
OPINION OF THE TRIAL COURT

STATE OF MICHIGAN
IN THE RECORDER'S COURT FOR THE
CITY OF DETROIT

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff,

v

FAROD MALLORY AND GARY GOODWIN
Defendants.

R.C: 89-9426

DECISION
DEFENDANTS' MOTION TO DISMISS

The defendants, Farod Mallory and Gary Goodwin brought these Motions for Dismissal charging that lengthy pre arrest delay prejudiced their rights to have a fair trial in this case. The Court having heard testimony, the arguments of counsel and having read and considered the supporting memoranda and case authorities grants the Motions to Dismiss.

I.

On June 22, 1984, Donald Bankston was shot and killed in the City of Detroit. In late 1985 Defendants Gary Goodwin and Farod Mallory were arrested and investigated regarding the shooting. On November 8, 1985, a warrant request submitted to the Wayne County Prosecutor's office by Sergeant William Rice of the Detroit Police Department was denied. Sergeant Rice testified the denial was based on insufficient evidence including lack of a positive identification. The case remained an "open shooting."

Sergeant Rice further testified that in 1986 he joined a federal Task Force which investigated the Young Boys, Inc. organization. The murder of Donald Bankston along with twenty-two other cases being handled by Sergeant Rice because a part of the Task Force investigation. As part of his investigation Sergeant Rice

met and took a statement from Spencer Holloway. In the statement taken on August 22, 1986 Holloway indicated that Gary Goodwin and Farod Mallory, among others, were involved in the murder of Donald Bankston and claimed to provide the positive identification that had been lacking in the case.

Sergeant Rice refrained from using Spencer Holloway's statement at that time because the grand jury proceedings were secret. He also stated that he was prevented from using the statement at that time because of an agreement between the Wayne County Prosecutor's office and the Federal Task Force. He noted that the agreement was that information obtained during the Task Force investigation would not be used for prosecution until the federal indictments were opened.

Sergeant Rice testified that he wanted to seek corroboration of Holloway's

statement even though he personally believed ("never doubted") Spencer Holloway. According to Sergeant Rice physical evidence was also being sought even though the murder had occurred nearly two years earlier.

The federal grand jury sealed an indictment based on the Young Boys, Inc. investigation in mid 1987. By February 1988 Sergeant Rice had obtained a statement from Charles Obey that purportedly corroborated the statement of Spencer Holloway. At that time no warrant was sought. Between February and October 1988 Sergeant Rice interviewed Milton Jones, Portia Sturtevant and others regarding the murder of Donald Bankston. The prosecution claims the length of time involved in arranging these interviews resulting from the necessity of security custody of the witnesses from other institutions.

Farod Mallory testified that he had

asked Sergeant Rice in February 1986, if were going to be charged with the Bankston murder. Defendant Mallory also produced a copy of a letter sent to Wayne Count Prosecutor John O'Hair requesting that any outstanding charges be promptly brought against him and resolved.

A warrant request was prepared and sent to the Prosecutor's office on October 10, 1988. Sergeant Rice indicated he was not aware of any defense alibi witnesses at that time.

Defendant Gary Goodwin testified his alibi witness died as a result of a broken blood vessel in June of 1988. Defendant Farod Mallory testified that he had two alibi witnesses, one of whom died in April 1988, the other in September 1989. Defendant Mallory claims to have been with these persons at the time of the murder. Death certificates and the testimony of

other witnesses supported Defendants' testimonies regarding these deaths.

The warrant request submitted October 10, 1988 was not signed by a prosecutor until seven months later, May 5, 1989. Sergeant Rice testified that the Prosecutor wanted to interview the witnesses. However, there is no indication such interviews took place.

It appears three periods of delay are in question: the delay that occurred as a result of the agreement with the federal Task Force and the secrecy of the grand jury proceedings, that prevented the use of Spencer Holloway's statement; the delay that occurred as a result of the police efforts to corroborate Holloway's statement; and a delay of seven months by the prosecutor's office. The question before the Court is whether under the law these delays unfairly prejudiced the Defendants and warrant dismissal.

II.

Dismissal of the criminal charge is the remedy when a defendant has been deprived of due process as a result of pre arrest delay. People v Hernandez, 15 Mich App 141 (1968). In Hernandez, the Michigan Court of Appeals required that where some prejudice, resulting from pre arrest delay, was shown, the prosecution had the burden of proving by clear and convincing evidence that: 1)the delay was explainable; 2) that the delay was not deliberate; and 3) that no undue prejudice attached to the defendant. Hernandez, supra, at 147. Subsequent to Hernandez, the United States Supreme Court set forth a two prong test for determining prearrest delay in U.S. v Lovasco, 431 US 783 (1977). The rest requires that there be proof of prejudice and an explanation for the reasons for the delay.

Applying Lavasco (sic) to the Michigan test set forth in Hernandez, the Michigan Court of Appeals adopted an approach that allows a court to consider the factors set forth in Hernandez and to weigh those competing interests to determine if there has been a due process violation. People v Bisard, 114 Mich App 784, 791 (1982). The Court held:

> ...once a defendant has shown some prejudice, the prosecutor bears the burden of persuading the Court that the reason for the delay is sufficient to justify whatever prejudice resulted. Bisard, supra at 791.

Defendants Mallory and Goodwin in this case have shown some prejudice. Defendant Mallory has testified that he was with two persons who are now deceased. The Court is satisfied those persons are now dead. The Court is also satisfied that it can be inferred their testimony would probably support that of Defendant Mallory, although

there is no evidence other than Mallory's to support that inference.

Defendant Goodwin's alibi witness, an Aunt is also deceased. The Court is likewise satisfied the witness is dead and that her testimony would probably have been consistent with Goodwin's. Similarly, there is no independent evidence to support this inference.

The Court makes these findings acknowledging that a Defendant might have the best evidence and access thereto regarding prejudice. Unfortunately, a defendant may not be able to independently support what witnesses heard, saw, or remembered about a certain event or a certain person nearly four or five years later.

The Court also recognizes that similar motions have been brought by other members of Young Boys, Inc. While this touches on the credibility of defendants Mallory and

Goodwin the Court is required to consider these motions on a case by case basis.

The Court finds Defendants have shown prejudice by the loss of their alibi witnesses.

The prosecution has borne the burden of persuading the Court that some of the delay was explainable.

The investigation of the Bankston murder continued after the original warrant request was denied by the Prosecutor's office in 1985. Nearly a year later the statement of Spencer Holloway provided positive identification of the defendants and their involvement in the murder. Delay following the receipt of this evidence resulted from the desire of Sergeant Rice to corroborate the statement and an agreement with the federal authorities not to disclose evidence obtained as part of the grand jury investigation of Young Boys, Inc.

Testimony indicated that part of the reason behind the agreement with federal authorities not to release information obtained from the grand jury investigation was to protect witnesses who were not in custody. The court in People v Bisard, 114 MA 784, 786, found that a pre arrest delay resulting from the need not to blow the cover of certain police officers was explainable and not a denial of due process. See also People v Anderson, 88 MA 513 (1979). This Court find the delay resulting from the agreement between the Wayne County Prosecutor's office and the federal authorities was explainable.

Given that one warrant request had been rejected the Court believes Sergeant Rice's desire for corroboration of the Holloway statement had merit and was a reasonable cause for delay. However, Holloway's statement of August 1986 was corroborated in some way by the statement

of Charles Obey obtained by February 1988. Even so, no warrant was requested until October 1988. This was an extremely long period of time to concentrate on corroboration where the element on which the denial of the original warrant was based--identification--had been overcome. The Court finds that this delay was also explainable.

The Court finds that although these two delays were explainable, the length of these delays, over two years, was unreasonable and resulted in prejudice to the defendants, Mallory and Goodwin.

Delay in this case also occurred between the time the warrant request was submitted October 10, 1988 and when it was signed by the Prosecutor, May 8, 1989 some seven months. Sergeant Rice testified that a new prosecutor was assigned to the case and wanted to talk to the witnesses. There is no evidence to show whether or not

witnesses were interviewed by the prosecutor's office. While an explanation has been given the Court finds it without merit.

The Court must also consider whether any of these delays were deliberate. In People v White, 59 Mich (sic) 164, 165 (1975) the Court of Appeals interpreted "deliberate" in this context to mean "deliberate delay tc prejudice the defendant." Applying White, the Court in Bisard indicated that a finding of "some bad faith on the part of the prosecution" was required. Bisard, supra, at 787.

Sergeant Rice in this case testified that he had no knowledge of a defense alibi of defendant Mallory or Goodwin. However, it is not surprising to this court that defendants gave no information to Sergeant Rice. They had not been charged. Defendant Mallory testified on two occasions he inquired whether he would be charged, to no avail.

The delays resulting from the decision of Sergeant Rice to corroborate Holloway's statement and from the secrecy imposed by the federal Task Force proceedings were not deliberate in that the delays were not designed to prejudice the defendants. Nor does the delay by the prosecution which was not fully explained appear to be in bad faith.

However, these delays were deliberate in the sense that they were intentional. The delay resulting from the agreement with the federal Task Force authorities was intended albeit for a good cause--protection of witnesses. The delay resulting from an interest in corroborating Holloway's statement was intentional. While Sergeant Rice certainly had good reason to seek such corroboration it delayed issuance of the warrant by over a year. At the time Sergeant Rice began seeking corroboration the investigation was already two years old. In addition, the

reason for initial denial of a warrant--positive identification--had been overcome by Holloway's identification of MalLlory and Goodwin which Sergeant Rice found credible. While the Court appreciates conscientious police work, it is during this period of delay, mid 1987 to October 1988, that defendants witnesses were lost.

The delay in signing the warrant resulted in nothing that advanced or helped secure the issuance or furthered the investigation of the murder. It did, however, further serve to prejudice the defendants.

If the defendant is in the best position to show prejudice, then the prosecution is in the best position to show that the delay was not to deliberately prejudice the defendant. This is especially true in this case where the reasons for the seven month prosecutorial delay is not supported by the evidence and

where the overall length of the delay is approximately four years.

In this case the prejudice resulting from the loss of essential alibi witnesses outweighs the reasons for delay which cannont in this case fully justify the resulting prejudice.

The defendants' Motions to Dismiss are granted.

/S/ Denise Page Hood

Judge, Recorder's Court